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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHRISTOPHER S. NOLAN

Appeal 2007-1446
Application 09/684,032
Technology Center 3600

Decided: December 19, 2007

Before TONI R. SCHEINER, DONALD E. ADAMS, and NANCY J. LINCK, *Administrative Patent Judges.*

ADAMS, *Administrative Patent Judge.*

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims 1-8 and 12-18, the only remaining claims pending in this application, claims 9-11, 19 and 20, have been withdrawn from consideration. We have jurisdiction under 35 U.S.C. § 6(b).

INTRODUCTION

The claims are directed to a liner for an elongated container for use in shipping cargo. Claims 1, 3, 7, 13, 14, and 15 are illustrative:

1. A moisture proof liner for an elongated container for use in shipping cargo, comprising:

four elongated panels of impervious film adapted to substantially match the elongated sides, top and bottom of said container;

first and second end panels to complete said liner;

an access opening along at least one side panel adapted for loading and unloading said cargo; and

a closure for said opening to seal said liner against moisture to protect the cargo.

3. [The liner of claim 1, wherein said access opening includes an open tube attached at one end to extend laterally from said opening to thereby form a passage for loading and unloading said cargo], wherein said liner and said tube are formed of plastic sheet and a heat seal bead extending around said orifice between said one side panel and the adjacent one end of said tube.

7. The liner of [c]laim 1, wherein the side panels include folds to allow expansion for substantially filling said container when said panels are fully extended.

13. A liner for an elongated container for use in shipping cargo, comprising:

four elongated panels of impervious film adapted to substantially match the elongated sides, top and bottom of said container, each of said elongated panels having a first length;

first and second end panels to complete said liner, each of said first and second end panels having a second length less than the first length; and an access opening along at least one side panel adapted for loading and unloading said cargo.

14. The liner of claim 13, wherein said liner is free-standing when erected in said container.

15. The liner of claim 13, wherein said first and second end panels are free of any openings.

The Examiner relies on the following prior art references to show unpatentability:

Paton	US 3,456,834	Jul. 22, 1969
Fell	US 3,951,284	Apr. 20, 1976
Krein	US 4,516,906	May 14, 1985
Krein	US 5,028,197	Jul. 2, 1991
Derby	US 5,746,862	May 5, 1998

The rejections as presented by the Examiner are as follows:

1. Claims 1, 2, 5, and 6 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Fell.
2. Claims 1, 2, 5, 6, 13, and 17 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Fell.
3. Claims 3, 4, 12, and 16 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Krein ‘197.
4. Claims 7 and 8 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Derby.
5. Claims 14 and 18 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Krein ‘906.

6. Claim 15 stands rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Paton.

We affirm.

DISCUSSION

Anticipation:

Claims 1, 2, 5, and 6 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Fell. The claims have not been argued separately and therefore stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). Therefore, we limit our discussion to representative claim 1.

Claim 1 is directed to a moisture proof liner for an elongated container for use in shipping cargo. The liner comprises four elements:

1. four elongated panels of impervious film adapted to substantially match the elongated sides, top and bottom of said container;
2. first and second end panels to complete said liner;
3. an access opening along at least one side panel adapted for loading and unloading said cargo; and
4. a closure for said opening to seal said liner against moisture to protect the cargo.

The Examiner finds that Fell anticipates claim 1. Fell teaches a flexible liner that is preferably made to form a cuboid shape (Fell, col. 3, ll. 6-7). Fell teaches a liner having sides adjacent the walls of a shipping vehicle, wherein the side of the liner adjacent the shipping vehicle door opening has at least two apertures in the upper portion of the liner for loading and at least one aperture in the lower portion for unloading (Fell, col. 2, ll. 13-23). Fell teaches that each of the apertures has a closing means

(Fell, col. 2, ll. 23-24). Fell teaches that the liner may be constructed from a film of, *inter alia*, polyolefin, polyester, nylon, p.v.c., vinyl coated fabric, or rubberized reinforced fabrics (Fell, col. 2, l. 64 - col. 3, l. 6). In addition, while Fell exemplifies a liner in the context of a box trailer, wherein the opening is at the end, Fell teaches that “it will be apparent to those skilled in the art that a similar type liner could be applied to a shipping vehicle having side walls, and opening doors in at least one of the walls, the shipping vehicle could be . . . in the case of rail transport, a freight car” (Fell, col. 8, ll. 28-34).

Appellant asserts that Fell “merely shows the conventional opening formed in the *end panel* of the liner”, while claim 1 requires “an access opening along at least one *side panel*” (Br. 8-9; Reply Br. 1). We are not persuaded by Appellant’s argument. As discussed above, while Fell exemplifies a liner with an opening in the end panel, Fell expressly states that “it will be apparent to those skilled in the art that a similar type liner could be applied to a shipping vehicle having side walls, and opening doors in at least one of the walls, the shipping vehicle could be . . . in the case of rail transport, a freight car” (Fell, col. 8, ll. 28-34).

We affirm the rejection of claim 1 under 35 U.S.C. § 102(b) as being anticipated by Fell. Claims 2, 5, and 6 fall together with claim 1.

Obviousness:

2. Claims 1, 2, 5, 6, 13, and 17 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Fell. Appellant provides separate arguments for the following three groups of claims: I. claims 1, 2, 13, and 17; II. claim 5; and

III. claim 6. Therefore, we limit our discussion to representative claims 1, 5, and 6. 37 C.F.R. § 41.37(c)(1)(vii).

The Examiner relies on Fell as discussed above.

Claim 1:

Appellant asserts that “not even a scintilla of objective evidence indicates that anything in the prior art ‘suggested’ the proposed modification to the liner disclosed in” Fell to arrive at Appellant’s claimed invention (Br. 11). For the reasons set forth in our discussion of the anticipation, we disagree.

Having found claim 1 anticipated by Fell, we affirm the rejection of claim 1 under 35 U.S.C. § 103(a) as unpatentable over Fell. “[A] disclosure that anticipates under § 102 also renders the claim invalid under § 103, for ‘anticipation is the epitome of obviousness,’ *In re Fracalossi*, 681 F.2d 792, 215 USPQ 569 (CCPA 1982).” *Structural Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 716 (Fed. Cir. 1984). Claims 2, 13, and 17 fall together with claim 1.

Claim 5:

Claim 5 depends from and further limits claim 1 by requiring that the access opening is approximately at the mid-point of one side panel. As discussed above, Fell teaches a liner for a shipping vehicle, such as a rail freight car, which has side walls, and opening doors in at least one of the walls (Fell, col. 8, ll. 28-34).

Accordingly, we disagree with Appellant's assertion that Fell does not teach an opening in a side panel (Br. 17). As the Examiner explains, “rail

freight cars do not have door openings in their ends and usually have openings along their mid point" (Answer 8). Accordingly, we agree with the Examiner that a person of ordinary skill in the art at the time the invention was made would appreciate that Fell teaches a rail freight car liner having an opening that would be approximately at the mid-point of one side panel.

We recognize Appellant's assertion that Fell's "liner would not work in a container with a side door, since the elongated sides of that liner would not 'substantially' match the corresponding sides of the container" (Br. 18). By ignoring the express teachings in Fell, Appellant arrives at the conclusion that in order for a person of ordinary skill in the art to use Fell's liner it would have to be turned 90 degrees so that the opening would face the side opening of the rail car. From this Appellant argues that this configuration would not read on the claimed invention because the elongated sides would not match the corresponding sides of the container. We are not persuaded. Not only is this argument inconsistent with the express teachings of Fell, but, the law presumes skill on the part of the artisan rather than the converse. *See In re Sovish*, 769 F.2d 738, 743 (Fed. Cir. 1985).

For the foregoing reasons we affirm the rejection of claim 5 under 35 U.S.C. § 103(a) as unpatentable over Fell.

Claim 6:

Claim 6 depends from and further limits claim 1 by requiring that the liner has a second access opening including a tube in the second side panel substantially opposite the first opening for loading/unloading cargo and a second closure for the second opening.

Appellant asserts that Fell does not contemplate an opening “in a second side panel substantially opposite the first opening, as expressly required by the claim” (Br. 18). Fell contemplates rail freight cars, and many freight cars have doors on both sides of the car. A person of ordinary skill in the art would appreciate that when a liner is used in a rail freight car, the liner would have an opening approximately at the mid-point of each side of the rail freight car to allow for loading and unloading on either side of the car. “A person of ordinary skill is also a person of ordinary creativity, not an automaton.” *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1742 (2007). Obviousness is viewed through the lens of a person of ordinary skill in the art with consideration of common knowledge and common sense. *Dystar Textilfarben GMBH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1367 (Fed. Cir. 2006). “[A] court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR*, at 1741.

For the foregoing reasons, we are not persuaded by Appellant’s argument. Accordingly, we affirm the rejection of claim 6 under 35 U.S.C. § 103(a) as unpatentable over Fell.

3. Claims 3, 4, 12, and 16 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Krein ‘197. Appellant provides separate arguments for the following three groups of claims: I. claims 3 and 4; II. claim 12; and III. claim 16. Therefore, we limit our discussion to representative claims 3, 12, and 16. 37 C.F.R. § 41.37(c)(1)(vii).

Claim 3:

Claim 3 depends from and further limits the liner of claim 1 to require that the liner and the tube are formed of a plastic sheet with a heat seal bead extending around the orifice between the side panel and the adjacent end of the tube.

The Examiner relies on Fell as discussed above. The Examiner finds, however, that Fell does not teach a heat seal bead extending around the orifice between one side panel and the adjacent end of a tube (Answer 6). We find, on the other hand, that Fell specifically teaches that the seams of the liner can be heat sealed (Fell, col. 3, ll. 6-7). Nevertheless, the Examiner relies on Krein '197 to teach heat sealing the seams of a liner (Answer 6). The Examiner finds that Krein '197 teaches "a plastic liner with joints that are fused together using heat" (*id.*).

We find no error in the Examiner's conclusion that the combination of references teaches a liner and a tube formed of plastic sheet and joined by a heat seal bead extending around said orifice between said one side panel and the adjacent one end of said tube.

Accordingly, we are not persuaded by Appellant's assertion that the combination of references fails to suggest heat sealing mating surfaces of the plastic liner (Br. 19). Therefore, we affirm the rejection of claim 3 under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Krein '197. Since Appellant does not argue it separately, claim 4 falls with claim 3.

Claim 12:

Claim 12 depends from claim 1 and requires that the liner is present in combination with a source of air for erecting the liner.

The Examiner relies on Fell as discussed above (Answer 6). The Examiner recognizes that Fell does not teach a liner in combination with a source of air for erecting the liner. To make up for this deficiency, the Examiner relies on Krein '197 to teach the use of "a source of air to aid in erecting the liner" (Answer 6).

We find no error in the Examiner's conclusion that the combination of references teaches a liner in combination with a source of air for erecting the liner. Because Fell teaches a liner with an opening along at least one side panel, we are not persuaded by Appellant's assertion that Krein '197 fails to teach the "use of an air source in conjunction with a liner with 'an access opening along at least one side panel'" (Br. 19).

Accordingly, we affirm the rejection of claim 12 under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Krein '197.

Claim 16:

Claim 16 depends from and further limits the liner of claim 13 to require that the liner is in combination with a manifold including a plurality of orifices for enabling installation of the liner via air pressure.

The Examiner relies on the combination of Fell and Krein '197 as discussed above. The Examiner finds that Krein '197 teaches that the air source used to aid in erecting the liner comprises a plurality of orifices, e.g., a manifold (Answer 6). We find no error in the Examiner's *prima facie* case of obviousness.

Appellant asserts that neither Fell nor Krein '197 teaches or suggests the manifold of claim 16 (Br. 19). We are not persuaded. Krein '197 specifically teaches that

[v]arious alternative methods of attaching the liner 16 to the air supply can be employed. Thus, the opening 18 can be connected directly to the blower outlet as illustrated or can be attached to various types of nozzles, connectors or the like which in turn are fed air from a blower, air manifold or even compressed gas cylinder or other equivalent source.

(Krein, col. 4, ll. 44-53.)

Accordingly, we affirm the rejection of claim 16 under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Krein '197.

4. Claims 7 and 8 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Derby. Appellant separately argues the claims.

Claim 7:

Claim 7 depends from claim 1 and further requires that the side panels of the liner include folds to allow expansion for substantially filling the container when the panels are fully extended.

The Examiner relies on Fell as discussed above. The Examiner finds that Fell does not teach a liner with folded panels (Answer 6). To make up for this deficiency, the Examiner relies on Derby to teach a liner for a container with panels having folding gussets (*id.*). Based on this evidence, the Examiner concludes that it would have been *prima facie* obvious to a person of ordinary skill in the art at the time the invention was made to

incorporate Derby's gussets into Fell's liner "to allow easy storage of the liner when not in use as well as making . . . deployment of the liner easier" (*id.*). We find no error in the Examiner's *prima facie* case of obviousness.

Appellant asserts that Derby "only shows gussets in the end panels" which does not meet the limitation in claim 7 which requires the folds be present in the side panels (Br. 20). We are not persuaded by Appellant's argument.

Claim 7 requires that the side panels include folds to allow expansion for substantially filling a container when the panels are fully extended. Derby teaches a liner "which minimizes waste of material in the finished product because the finished product is relatively form fitting to the standard rectangular roll-off waste container" (Derby, col. 1, ll. 34-37). Thus, Appellant and Derby were both interested in accomplishing the same thing, having a liner that substantially fills a container, or in Derby's words a liner that is form fitting to the container it is placed in. Derby teaches that while the liner exemplified is for one type of waste container, various sizes of liners can be made for other types of containers (Derby, col. 2, ll. 37-40). Derby teaches that when the gusset is unfolded it becomes the bottom of the liner (Derby, col. 2, ll. 64-65).

Derby approached the problem of producing a liner that will substantially fill a container by producing a liner with gussets that, when unfolded, becomes the bottom of the liner. Appellant approached the problem by placing gussets, or folds, in the side panels of the liner. Thus, the only difference between Appellant's claimed liner and the liner taught by the combination of Fell and Derby is the placement of the gussets, or folds. "[I]f a technique has been used to improve one device, and a person of

ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. . . . [A] court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.” *KSR* at 1740.

Placing the folds on the end panels or on the side panels to accomplish the same goal of substantially filling a container is nothing more than the predictable use of prior art elements according to their established functions, which in this case was well within the skill of a person in this art. “[A] court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR* at 1741.

Accordingly, we affirm the rejection of claim 7 under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Derby.

Claim 8:

Claim 8 depends from claim 7 and is written in product by process format. Specifically, claim 8 requires that the first and second end panels are formed by folded end sections of the side panels and a heat seal bead extending across the folds of the end sections.

As discussed above, Fell teaches that the seams of the liner can be heat sealed (Fell, col. 3, ll. 6-7). Derby teaches that “[t]he workpiece is heat sealed at locations predetermined by the configuration of the container in which it is to be inserted (Derby, Abstract). Appellant argues that “each and every limitation” of the claim is not found in the combination of Fell and Derby (Br. 20). For the foregoing reasons, we are not persuaded by Appellant’s argument. Accordingly, we affirm the rejection of claim 8

under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Derby.

5. Claims 14 and 18 stand rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Krein ‘906. Since Appellant does not separately argue these claims they stand or fall together. Therefore, we limit our discussion to representative claim 14. 37 C.F.R. § 41.37(c)(1)(vii).

Claim 14 depends from and further limits claim 13 to require that the liner is free-standing when erected in the container. The Examiner relies on Fell as discussed above. The Examiner recognizes, however, that Fell does not teach a liner that is free standing (Answer 6). To make up for this deficiency, the Examiner relies on Krein ‘906 to teach a liner for a container that is free standing when installed (*id.*). Based on this evidence, the Examiner finds that

[i]t would have been obvious to one of ordinary skill in the art, at the time of invention to modify the liner taught by Fell et al. to be free standing as taught by Krein ‘906 in order to decrease the complexity and time involved for installing the liner thereby making the liner easier to use.

(Answer 6-7.) We find no error in the Examiner’s *prima facie* case of obviousness.

Appellant asserts that there is no motivation to combine the references as applied by the Examiner because Krein ‘906 “disparages the ‘284 [Fell] Patent” in the ‘Description of Prior Art’ (“906 Patent, col. 1, ll. 35-40)” (Br. 21). We disagree. What Appellant characterizes as a “disparagement” of Fell is nothing more than a description of Fell, which Krein ‘906 intends to improve upon. Accordingly, we are not persuaded by Appellant’s argument.

Therefore, we affirm the rejection of claim 14 under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Krein ‘906. Claim 18 falls together with claim 14.

6. Claim 15 stands rejected under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Paton. Claim 15 depends from and further limits claim 13 to require that the first and second end panels are free of any openings.

The Examiner relies on Fell as discussed above. In this regard, Fell teaches liner for a shipping vehicle having side walls, and opening doors in at least one of the walls, e.g., a rail freight car (Fell, col. 8, ll. 28-34). According to the Examiner, Fell teaches the placement of the openings of the liner at the same location as the openings in the container to which the liner is to be installed (Answer 7). Paton illustrates that a rail freight car has opening doors in at least one of its walls (Paton, Fig. 3). Accordingly, we find no error in the Examiner’s *prima facie* case of obviousness.

Appellant asserts that Fell only contemplates an opening in the end of a liner, not a side panel (Br. 21). For the reasons discussed above, this assertion is factually incorrect. Appellant argues that Paton teaches a liner that has openings in the ends (*id.*). According to Appellant, the combination of Fell with Paton set forth by the Examiner would dramatically change the operation of Paton’s invention (Br. 22). Appellant’s arguments are not persuasive. Fell is sufficient on its own to meet the requirements of claim 15. Paton simply supports the Examiner’s assertion that rail freight cars have side wall doors. That Paton prefers a particular liner and liner installation protocol, does not negate the clear teaching in Fell of a liner

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which has only an opening along at least one side wall in the location of the doors. Appellant's argument to the contrary is not persuasive.

Accordingly, we affirm the rejection of claim 15 under 35 U.S.C. § 103(a) as unpatentable over the combination of Fell and Paton.

CONCLUSION

In summary, we affirm the rejections of record.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

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